MINORITY ISSUES IN JURY MANAGEMENT

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Introduction

There are two aspects of the significance of minority access to and representation on juries that should be recognized at the outset of the discussion of minority concerns about juries. First, one of the cornerstones of our democracy is the right of each criminal defendant to be tried by jury.[1] The two key features of trial by jury are (1) assurance of neutrality and impartiality, and (2) a representative cross-section of the population.[2]

In lay terms, it has come to be called the right to be tried by a jury of one's peers. This common understanding is well illustrated by David Allen Brown, a resident of Long Branch and president of that town's chapter of the NAACP, who gave the following testimony at a public hearing:

> I've peeked in some courts. I don't see anybody that looks like me. And I, and I'm saying looks like me, because I think I'm an all right individual.[3]

Another witness, Reginald P. Jeffries, makes additional points in his testimony:

> ...we also look at the fact of jury selection in all of the areas of the state and if we're tried, it's supposed to be a trial by one's peers, that there should be enough of one's peers on that trial or selected [for] that trial rather than to have a perhaps all white jury in terms of the person of color being accused of the infraction.[4]

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[1]The discussion of juries will focus primarily on juries in criminal matters given the facts that the Task Force received the most information on criminal juries, that they are constitutionally mandated, and that this is the type of jury believed most likely to come to the layperson's mind when the subject of juries is raised. Attention will be given to both juries in civil matters and grand juries and, except where explicitly stated otherwise, all three types of juries should be considered implied by the single term "jury."

[2]State v. Ramseur, 106 N.J. 123, 226 (1987); State v. Gilmore, 103 N.J. 508, 524 et seq. (1986).

[3]Neptune Public Hearing 472 (February 27, 1990).

[4]East Orange Public Hearing 319 (November 29, 1989). Thomas E. Daniels, representing a coalition of NAACP branch offices in Monmouth and Ocean Counties, also made these points. Perth Amboy Public Hearing 720-721 (December 7, 1989).

The view that a minority defendant should be entitled to be judged by a jury that includes at least one minority is an old one. Early in 1900, William Bullock, "a colored man" who was charged with murder, was tried and convicted by a jury drawn from a panel on which "no colored man" appeared. He was sentenced to death. He appealed on the grounds that his civil rights guaranteed by the Fourteenth Amendment to the United States Constitution had been denied. The appeal failed due to the following rationale: "[U]pon the trial of a colored man the absence of negroes from the panel of jurors is not error in the absence of proof that this exclusion was done designedly, or that such persons were omitted otherwise than in the same way that white citizens not selected were omitted." Bullock v. State, 65 N.J.L. 557, 564 (1900).

But there are other dimensions of exactly what trial by "a jury by one's peers" means in some segments of the minority community. Here is one example:

> To me that [being judged by one's peers] means both socio and economic peerage. ...it is my opinion that an affirmative action or a number crunching process be put in place to absolutely have peer judging — a peer judging system.[5]

One widely recognized authority on juries makes two statements that help sum up the import of the concept of juries' being constituted of peers.

> The jury representing a cross-section of the community, randomly selected, conforms to our commitment to a pluralistic society and a democratic government. ... When we talk of a jury of one's peers in the community today, we mean a jury drawn from the whole population of the area and representing a cross-section of it.[6]

The second introductory consideration points to the fact that jury service shares an interesting bond with suffrage. Jury service and voting long have been key elements of people's right to participate in public intercourse. They are two of the strongest symbols of enfranchisement, citizenship, civic duty, and civil rights in our democracy. Exclusion from the one often has occurred concurrently with exclusion from the other. The converse is true as well: getting the vote often has come about concurrently with being allowed to serve on juries.[7] The opportunity of serving on juries typically has followed suffrage and has served as a significant fruit of that civil right. Some interesting connections between jury service and voting will be discussed below.

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[5]Robert Lawrence, Trenton Public Hearing 883 (December 8, 1989).

[6]J.M. Van Dyke, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE IDEALS 18-19 (1977).

[7]"Racial discrimination in political and civil rights was the rule in the free states and any relaxation the exception. The advance of universal white manhood suffrage in the Jacksonian period had been accompanied by Negro disfranchisement. Only 6 per cent of the Northern Negroes lived in the five states--Massachusetts, New Hampshire, Vermont, Maine, and Rhode Island--that by 1860 permitted them to vote. The Negro's rights were curtailed in the courts as well as at the polls. By custom or by law Negroes were excluded from jury service throughout the North. Only in Massachusetts, and there not until 1855, were they admitted as jurors. Five Western states prohibited Negro testimony in cases where a white man was a party. The ban against Negro jurors, witnesses, and judges, as well as the economic degradation of the race, help to explain the disproportionate numbers of Negroes in Northern prisons and the heavy limitations on the protection of Negro life, liberty, and property." C. V. Woodward, THE STRANGE CAREER OF JIM CROW 20 (Third revised ed.; 1974).

FINDING #1

WHILE THE JURY SYSTEM IS SUPPOSED TO HELP ASSURE LEGITIMACY OF THE JUSTICE SYSTEM THROUGH REPRESENTATIVE COMMUNITY PARTICIPATION, THERE IS CONCERN THAT DECISIONS REACHED BY JURIES SOMETIMES DISCRIMINATE AGAINST MINORITIES, RESULTING IN AN EROSION OF MINORITY CONFIDENCE IN THE SYSTEM.

The jury system is intended to be representative of the community, drawing on the participation of persons from all walks of life and virtually all groups.

> The jury is the embodiment of the realization that only by gathering together persons from all sectors of society, presenting the evidence in a controversy to them, and asking them to deliberate on the issues involved can we be sure that all relevant perspectives have been considered and that the verdict represents the community's collective judgment on the controversy."[8]

Furthermore, the jury system plays a significant role in affecting people's views of the integrity of the system and their confidence in it.[9] The Task Force believes that while this is surely true for all citizens regardless of race or ethnicity, it is especially true for minorities. Through juries, perhaps above all other aspects of the Judiciary, minority confidence in the Judiciary will be won or lost.

> The importance of equal rights for all races cannot be disputed. Another concern, however, is the need to preserve complete fairness and justice in the nation's courts, in theory, in perception, and in practice. This concern is equally compelling because it implicates the nation's ability to ensure that equality. Even the slightest appearance of invidious discrimination in a court of law cannot be permitted.[10]

Misunderstanding of persons who are racially or ethnically different from oneself, when combined with prejudice toward such persons, introduces factors that erode impartiality. When all-white juries are given the responsibility of weighing the testimony or judging the guilt of minority persons, the risk that misconceptions and prejudice of varying degree can lead to misinterpretations of evidence is increased.[11] That risk must be reduced by making sure that juries

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[8]Van Dyke, supra n. 5, at 219.

[9]For an expanded discussion of this issue, see Van Dyke, id., at 32-35.

[10]R.M. O'Connell, "The Elimination of Racism from Jury Selection: Challenging the Peremptory Challenge," 32 B.C.L. REV. 433, 485 (1991).

[11]A psychologist who reviewed laboratory and archival studies of the subject concluded, "There is little evidence, however, to suggest that real jurors are (continued...)

are composed of a cross-section of the community. The issue has been summarized by the New Jersey Supreme Court in the following way:

> In short, the main point of the representative cross-section rule is 'to achieve an overall impartiality by allowing the interaction of diverse beliefs and values the jurors bring from their group experiences,' (citations omitted) and in this manner to vindicate the defendant's right to trial by an impartial jury in our heterogeneous society.[12]

Some argue that an all-white jury is "the ultimate obstacle to justice for African-American criminal defendants."[13] The issue was summarized eloquently by Augustinho Monteiro, President of the Greater Red Bank Chapter of the NAACP:

> [I]f there's nothing that the Courts can do to get the number of African-Americans on those juries, grand juries and the juries, then all the rest of it doesn't amount to a roll of beans. And I say that for a very good reason solid reason.... There are very few people, other than African-Americans, that understand the African-American psyche. Nobody else has ever had or ever lived or perhaps could ever have endured what African-Americans have in this country.[14]

Hence the issue at stake here is really as much the fairness of the judicial process as it is the confidence in the system of one segment of the community, i.e., minorities.

There is a second aspect in which the degree to which minorities are adequately represented on juries affects their confidence in the judicial system. When minorities serve as jurors, they, like non-minorities, have an opportunity to participate in and own a part of the administration of justice. Not only does this participation provide some sense of ownership, it also has a pedagogical function. It is an opportunity, as the Committee on Minority Concerns observed,

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[11](...continued)
adhering to these attitudes [i.e., racial prejudice] when they determine the guilt or innocence of [minority] defendants." J.E. Pfeifer, 69 NEB. L. REV. 230 (1990).

By contrast, a professor of law who has attempted to find out what is required in the legal system to eradicate the vestiges of slavery concluded, "Historical evidence and recent sociological data show that all-white juries are unable to be impartial in cases involving the rights of African-American defendants or crime victims." D.L. Colbert, "Challenging the Challenge: Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges," 76 CORNELL L. REV. 1, 5 (1990).

[12]Gilmore, supra n. 1, at 525.

[13]Colbert, supra n. 10, at 5, 128.

[14]Neptune Public Hearing 417 (February 27, 1990).

"to dispel the aura of mystery which surrounds the judicial system in the minds of many minorities."[15]

In the context of both civil and criminal juries, some of New Jersey's minorities believe that juries' decisions are less favorable for minorities. With respect to juries in **civil** matters, the Committee on Minority Concerns reported "the tendency of juries to make smaller awards in personal injury cases where the plaintiff is a minority."[16] That Committee interpreted this to reflect the imputation by jurors of different values on pain undergone by minorities who have suffered injuries compared to similarly situated whites.[17]

In the context of **criminal court**, the Committee on Minority Concerns concluded that the fact that minority defendants are infrequently judged by juries that include minorities, leaves minority defendants "prey to the prejudices and fears of that unrepresentative jury." The Committee suggested that another factor leads unrepresentative juries to reach conclusions that may not be justified: the probability that such juries may misinterpret and misunderstand cultural and ethnic idiosyncrasies presented by minority witnesses and defendants who come from dissimilar cultural and ethnic backgrounds.[18]

The answers to two questions posed in the survey the Task Force conducted of judges' and top court managers' opinions also provide some support for this finding. About one-third (34%) of the respondents indicated the opinion that minority defendants are sometimes more likely to be wrongfully convicted than white defendants and the opinion of almost one-half (44%) was that racial prejudice affects jury verdicts when minorities are parties in a dispute. Tables 1 and 2 provide further details. **It is clear, then, that there is considerable sentiment that minorities too often are subjected to unequal treatment by juries.**

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[15]REPORT OF COMMITTEE ON MINORITY CONCERNS 32 (Summer 1984) (hereinafter COLEMAN REPORT).

[16]Id. at 21.

[17]Id., n. 11 at 21.

[18]Id. at 31-32.

TABLE 1

Percentage Distribution of Responses to
the Court Process Questionnaire, Q52:
"The chances of a jury's wrongful conviction
are higher for a minority defendant than for a white defendant."

Respondent Group	Never	Rarely	Sometimes	Usually	Always
Judges only	19%	51%	24%	6%	1%
Managers only	10%	49%	32%	7%	2%
Judges & Managers	15%	50%	27%	6%	1%

TABLE 2

Percentage Distribution of Responses to
the Court Process Questionnaire, Q53:
"When minorities are parties in a dispute, racial
prejudice affects jury verdicts."

Respondent Group	Never	Rarely	Sometimes	Usually	Always
Judges only	9%	48%	39%	4%	1%
Managers only	6%	42%	51%	1%	1%
Judges & Managers	7%	45%	44%	3%	1%

FINDING #2

THERE IS WIDESPREAD BELIEF AMONG MINORITIES THAT THEY, LIKE EVERYONE ELSE, (1) SHOULD BE JUDGED BY JURIES OF THEIR PEERS, BUT THAT (2) THEY ARE UNDERREPRESENTED ON JURIES AND THEREFORE (3) ARE LESS LIKELY TO BE JUDGED BY THEIR OWN PEERS.

One of the perennial issues in the administration of justice from the perspective of minorities has been their widespread underrepresentation on juries. One summary put it this way:

> Racial discrimination in the administration of justice has been chronic. Not only have physical facilities such as courtrooms and prisons and jails been segregated, but minority members were traditionally deemed not competent to serve on juries, were denied employment in law enforcement, and because of limited opportunities for education, had no chances to become members of the bar, judges, or prosecutors.[19]

[19]E.R. Larson and L. McDonald, THE RIGHTS OF RACIAL MINORITIES 186 (1980).

This underrepresentation of minorities on juries has been documented in many jurisdictions, including both the federal and state courts. In his review of the literature and statistics on the subject, which included both federal courts and some fifteen state courts, Jon M. Van Dyke concluded that underrepresentation of minorities on juries is "the rule." He found further that while African-Americans are surely underrepresented, "persons of Hispanic origin, Native Americans, and Asians, are underrepresented even more dramatically than are blacks."[20]

The Task Force has neither found nor produced statistics that permit documentation of actual underrepresentation of minorities on juries in New Jersey, or the degree and relative rates of such minority underrepresentation. Such data are not collected by jury managers. However, all sources which have commented on the subject of juries to the Task Force report the firm conviction that racial and ethnic minorities indeed are underrepresented and that there is no reason to believe New Jersey is different from those jurisdictions where research has documented minority underrepresentation.

There are three types of comments on minority underrepresentation in New Jersey. First, several witnesses who testified in the Task Force's public hearings reported having seen few or no minority jurors in the cases they had observed or been involved with. For example, a Latino attorney testified: "I have seen jury selection process eliminate systematically minority members out of juries when we have minority defendants."[21]

Second, there have been several challenges to jury selection practices in specific cases on trial in New Jersey based on some aspect of underrepresentation of minorities. An initial allegation relating to a challenge of underrepresentation has been mounted in at least ten counties, although no court has yet held that constitutionally significant underrepresentation has been shown.[22]

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[20]Van Dyke, supra n. 5, at 30.

[21]Billy Delgado Muñoz, Perth Amboy Public Hearing 753 (December 7, 1989).

[22]Interview with Michael F. Garrahan, Chief, Technical Assistance, Administrative Office of the Courts, in Trenton (May 22, 1991). A helpful review of the issues is provided in one such case, State v. Ramseur, supra n. 1, at 212.

Finally, the New Jersey Supreme Court, when discussing representation in Essex County, stated, "We agree, however, that the results [of certain improvements to increase the representativeness of juries] are still far from optimal. Greater representativeness on the jury panels is obviously desirable."[23] The Court also has ruled that, in some cases, minorities are impermissibly eliminated from jury service.[24]

FINDING #3

THE DEGREE TO WHICH MINORITIES MAY BE ACTUALLY UNDERREPRESENTED ON JURIES IN NEW JERSEY IS UNKNOWN.

The Task Force considered the basic ways in which underrepresentation could occur and identified three basic questions for research:

1. What is the representation of racial/ethnic minorities in the initial pools from which prospective jurors are drawn, i.e., voter registration and driver's license lists?

2. To what degree do racial/ethnic minorities drop out at each of the major stages leading up to the empaneling of a jury (e.g., response rate to initial summons, disqualifications, excusals, failure to appear, non-selection, challenges) and how do these rates compare to those of whites?

3. What is the actual representation of minorities on juries that are ultimately empaneled?[25]

The Task Force intended to find the answers to the three critical questions through its research program. Research plans were developed in consultation with an expert on juries at the National Center for State Courts. However, the research was not conducted and the Task Force cannot at this point answer these three important questions.

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[23]State v. Ramseur, id. at 226 (1987).

[24]The leading case is Gilmore, supra n. 1.

[25]One witness who spoke at the public hearings made the following statement. Whether it is based on some empirical research is unknown, but it at least illustrates what some minorities **believe** the proportion to be. "There must be a higher selection of minorities from the general public to serve on your grand juries, as well as your petit juries. It is literally a scandal, it's scandalous, where when you have 12 percent of your population in the state is African-American, and in your jury system, you have less than 1 percent serving. It is an outrage when you have as many African-Americans in this -- Monmouth County, and you have less than a dozen that serves on grand jury throughout its term." Augustinho Monteiro, Neptune Public Hearing 417 (February 27, 1990).

FINDING #4

THE PRINCIPLE OF BEING TRIED BY A JURY OF ONE'S PEERS CANNOT BE FULLY IMPLEMENTED FOR ALL GROUPS OF MINORITIES AS LONG AS CERTAIN LEGAL AND SOCIOECONOMIC FACTORS REMAIN—WHICH ON THEIR FACE APPEAR TO BE RACE- AND ETHNICITY-NEUTRAL—THAT IMPEDE MINORITY JURY SERVICE. THE COMBINED EFFECTS OF CERTAIN QUALIFICATIONS, EXEMPTIONS, AND SOCIOECONOMIC CONDITIONS ARE THAT UP TO ABOUT ONE-HALF OF EACH MINORITY GROUP IS EXCLUDED FROM JURY SERVICE.

The Task Force has discovered that several factors which must contribute to the underrepresentation of minorities on juries are not sufficiently recognized. These factors possibly introduce legitimate doubt as to whether the principle that persons should be tried by jurors of their peers is possible for all groups of minorities. The classical supposition appears to be that jury pools should consist of minority persons in rough equivalence to their proportions of the general (or adult, "age-eligible") population. If the proportion of minority jurors in the pool is not within an acceptable range of the proportion of minorities in the general population, there may be de facto discrimination.[26]

An example of this assumption is a recommendation of the Committee on Minority Concerns. It recommended the "Establishment of an overall goal that minority representation on juries should reflect the minority presence in the vicinage...."[27] It is then postulated that underrepresentation occurs because minorities are less likely to be included in the pools from which jurors are ultimately empaneled, i.e., "proportionally more blacks than whites do not register to vote and do not have driver's licenses."[28]

The Task Force has no information to substantiate or disprove that supposition, but the following discussion indicates that there are at least eight

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[26]Some call this the "absolute deficiency standard." E.R. Larson and L. McDonald, THE RIGHTS OF RACIAL MINORITIES 189 (1980).

This was the approach followed by Dr. John Lamberth, a social psychologist who wrote for the New Jersey Office of the Public Defender a report entitled "Report on Camden County Jury Selection System" (March 10, 1986). For example, he wrote, "Hispanics were significantly underrepresented in the sample [of a jury panel]. There were 0.93% of the individuals surveyed who indicated that their ethnic background was Hispanic, while the proportion of jury age Hispanics in Camden County is 3.27%. This is comparative disparity of 71.56'% and statistically significant...." At 2. He found Hispanics to be much more underrepresented than blacks (who whose comparative disparity figure was calculated to be 28.42%), but both were underrepresented. Ibid.

[27]COLEMAN REPORT, supra n. 13, at 33.

[28]Ramseur, supra n. 1, at 227.

other factors that may account for the apparent underrepresentation of minorities on juries. The first five to be discussed are impediments introduced by three qualifications and one exemption for jury service established by law, plus the dilemma of bilingual jurors in cases where testimony will be taken through interpreters. The remaining three factors are socioeconomic and independent of the legal impediments.

Before proceeding to discuss the eight factors that are believed to inhibit access to jury service for minorities, it must be noted that many people, minority and non-minority alike, dislike jury service. A review of the public's general view of jury service is summarized by Van Dyke:

> Although jury service is supposed to be a right and privilege of citizenship, most people consider it a nuisance. Being a juror is time-consuming and inconvenient, and it is frequently a financial hardship as well. In some jurisdictions, jurors may be required to serve for several months, continuously. Getting to the courthouse every day may be a problem. Those who care for children or the old or infirm must find someone to do that task, possibly at considerable cost. Those with heavy responsibilities in their work believe they cannot be absent for a few weeks or longer; those in insecure positions may fear loss of their jobs. Many in fact will lose income.
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> About 60 percent of all people whose names are pulled from the master wheel and who receive a questionnaire seeking to determine their qualifications for jury service return the document requesting to be excused.[29]

Factor #1: Citizenship Status

The first qualification stipulated by statute effectively limits jury service by minorities is the requirement that a juror "shall be a citizen of this State...." N.J.S.A. 2A:69-1. According to the U.S. Census for 1980,[30] 317,788 persons (4% of the entire population) residing in New Jersey in 1980 were not citizens. However, analysis of the proportion of non-citizens among the various minority populations shows varying rates of non-citizenship. **The requirement of citizenship affects African-Americans the least (3% of the black population in 1980 was non-citizen, which is lower than the rate for whites), has a moderate**

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[29] Supra, n. 5, at 111.

[30] Census data from 1990 on the variables discussed in this section are not yet available. Data from 1980 are used throughout since that is the most recent year for which data are available for all of the variables used in this discussion (although more recent estimates for some variables may be available from the Bureau of the Census).

effect on Hispanics (23% of persons of Spanish Origin in 1980 was non-citizen), and a significant effect on Asians-Pacific Islanders, one-half of whom were non-citizens. While these data are not yet available for the 1990 Census, there is no reason to believe that the percentages of non-citizens should have declined during the past decade. Table 3 provides demographic information on the patterns of citizenship among various racial and ethnic groups.

TABLE 3

PATTERNS OF CITIZENSHIP AMONG VARIOUS RACIAL/ETHNIC CATEGORIES OF PERSONS RESIDING IN NEW JERSEY IN 1980[31]

Racial/Ethnic Group	Total # of Non-citizens within Group	% of Each Group's Total 1980 Population which Is Non-citizen
White	211,824	3
Black	23,634	3
Asian-Pacific Islander	54,225	50
Spanish Origin	112,010	23
Statewide Totals	317,788	4

[31]Bureau of the Census, U.S. Dep't. of Commerce, 1980 CENSUS OF POPULATION, Detailed Population Characteristics: New Jersey, PC80-1-D32, Table 194, 32-7 (1983). Readers should be aware of the following facts about census data for racial and ethnic groups. First, the meaning of the various categories should be understood. The categories for "white," "black" and "Asian or Pacific Islander" are labeled "racial" categories. "The data on race were derived from answers to question 4, which was asked of all persons. The concept of race as used by the Census Bureau reflects self-identification by respondents; it does not denote any clear-cut scientific definition of biological stock." Ibid., Appendix B, "Definitions and Explanations of Subject Characteristics," B-3.

"Spanish Origin," however, is not a part of the "racial" item. It comes from question #7. "Origin or descent can be regarded as the ancestry, nationality group, lineage, or country in which the person or person's parents or ancestors were born before their arrival in the United States. It is important to note that persons of Spanish origin may be of any race." Ibid. at B-5.

Second, analysts of Census data should be aware, then, that, unless otherwise indicated, persons of Spanish Origin are also counted in the racial categories since the data come from two separate questions. Hence the sum of the racial categories plus the Spanish origin category will not equal the totals reported in the tables.

Factor #2: Criminal History

The second qualification for jury service that reduces the availability of minority jurors is that jurors "shall not have been convicted of a crime."[32] There are no data for New Jersey of adults generally or minority adults specifically who have an unexpunged conviction. However, indirect evidence suggests that **some groups of minorities (African-Americans and Latinos) are significantly more likely to have unexpunged convictions than are whites; two groups of minorities (Asians-Pacific Islanders and American Indians) are less likely to have unexpunged convictions than whites.**

The first indicator of the effect of this qualification on some groups of minorities is the representation of minorities in the state prison system. Obviously this is the smallest category of persons with convictions and does not include convicted persons who either are presently under some other sanction or who have completed the terms of whatever sentence may have been imposed. Since data are not available on either of the latter two categories, data on the state prison population will have to suffice as an indirect indicator.

The most current data available that contrast New Jersey's adult population show that **the further people go into the criminal justice system, the proportion of whites decreases 44 points from 76% to 22% while the proportion for Blacks increases 49 points from 12% to 61%. The representation of Hispanics increases about 7 points from 12% to 16%.** The numbers of prisoners of Asian-Pacific Islander or American Indian origins are negligible (10 and 6 prisoners respectively for 1989). Both the proportion of the total prison population compared to the proportion of the general population shows both groups to be underrepresented in the prison population when compared to whites.[33]

The statistics show further disproportionality when the rate of incarceration per 10,000 population is calculated. As was shown in Chapter Three, **adult African-Americans are incarcerated in state correctional facilities at the rate of 130 per 10,000 and adult Latinos at the rate of 47 per 10,000 while whites are so sanctioned at the comparative rate of 6 per 10,000.**

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[32] N.J.S.A. 2A:69-1.

[33] See Table 23 and Figures A and B in Chapter Three, pp. xx-yy, supra, for further statistics and the sources of these data.

We also reported in an earlier chapter[34] the finding of the Sentencing Project of Washington, D.C., that almost one in four (23 percent) black men in the 20-29 age group is either in prison, jail, on probation, or on parole on any given day. That figure compares to one in 16 (6.2%) for white males and one in 10 for Hispanic males (10.4). The disproportions are similar for women: the relative rates for women are 2.7% for Blacks, 1% for whites, and 1.8% for Latinos.[35]

If these figures can be applied in New Jersey, they suggest that at least one-fourth of black males in their twenties may be ineligible to serve on juries at any given time. The figure is probably higher since other African-American males in their twenties surely have completed or are completing sentences. Regardless of what the actual numbers for New Jersey may be, it is clear that disproportionate numbers of black males are disenfranchised from jury service by virtue of criminal records. **African-Americans especially and Hispanics to a lesser degree are excluded from eligibility to serve on juries at much higher rates than whites due to the conviction-free qualification. However, both Asians-Pacific Islanders and American Indians appear to be less likely than whites to be excluded from jury eligibility due to criminal records.**

A related effect of the issue of criminal convictions should be noted. Prosecutors sometimes challenge prospective jurors because they have close relatives who either have been convicted or who are awaiting trial.[36] This suggests yet another factor that inhibits access to jury service for minorities and may increase the underrepresentation of minorities on juries.

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[34]Ibid.

[35]M. Mauer, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 3 (February 1990).

[36]In the recent case of Hernández v. New York, the case where the issue of dismissing bilingual jurors was the key issue on appeal, such exclusion had occurred during the trial. "Two of the Latino venirepersons challenged by the prosecutor had brothers who had been convicted of crimes, and the brother of one of those potential jurors was being prosecuted by the same District Attorney's office for a probation violation." 59 LW 4501, 4502 (May 28, 1991).

Factor #3: English Language Proficiency

The last qualification that disproportionately impedes minority access to the jury box is the requirement that jurors "shall be able to read, write and understand the English language...." N.J.S.A. 2A:69-1.[37] Given the fact that numerous minorities have a mother tongue other than English, the ability of minorities to meet this standard erects a barrier that many cannot surmount. Unfortunately neither the statute nor case law describe **how well** one must be able to read, write, and understand English to serve as a juror. Nor is there any indication of **how** such determinations are to be made. Just how well one must be able to perform these skills is a serious concern for minorities whose mother tongue is a language other than English or if they are deaf. We suspect that the requirement to read, write and understand English imposes a very difficult litmus test on many linguistic minorities even without a formal, behavioral definition of **how well.**[38]

[We are taking a look at whether the requirement to read English imposes a differential burden. It may be that minorities who are native born may be more likely than whites to be excluded by this requirement.]

At the most elementary level, this requirement eliminates many persons from eligibility. According to the 1980 Census, 3% of New Jersey residents who are five years or older speak English not well or not at all.[39] This requirement,

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[37]However, decisions reached early in this century by juries on which a non-English-speaking juror sat were not been overturned. Dickerson v. North Jersey Ry. Co., 68 N.J.L. 45 (1902). "If the inability of a juror to understand the English language is good cause for setting aside a verdict, the same rule must be applied where a juror is illiterate and unable to comprehend the meaning of expert evidence or technical terms used by witnesses during the progress of the trial." Id. at 47.

[38]An analogous problem is determining when a defendant or witness should have an interpreter. The following references provide helpful introductions to the complexity of the issues involved: R. D. González, THE DESIGN AND VALIDATION OF AN EVALUATIVE PROCEDURE TO DIAGNOSE THE ENGLISH AURAL-ORAL PROFICIENCY OF A SPANISH-SPEAKING PERSON IN THE JUSTICE SYSTEM (Unpublished dissertation; 1977); G. Valdés, "When Does a Witness Need an Interpreter? Preliminary Guidelines for Establishing Language Competence and Incompetence," 3 LA RAZA LAW J. 1 (1990).

Some interesting testimony on the subject was given by Edwin Flores, Esq., of the Hispanic Bar Association. See Paterson Public Hearing 677-683 (November 29, 1989).

[39]The population of persons five years old or older was 6,903,354 and the population of persons who reported speaking English not well or not at all was 213,993. U.S. Dep't. of Commerce, Bureau of the Census, 1980 CENSUS OF (continued...)

however, has an especially dramatic effect on Latinos, and a lesser, although still significant, impact on Asians-Pacific Islanders. The 1980 Census showed that 28% of the 442,774 Hispanic persons five years old or older indicated that they spoke English not well or not at all. The corresponding percentage for Asians-Pacific Islanders is 11%.[40]

On the one hand it is difficult to state with exactitude that Latinos and other linguistic minorities automatically are disqualified at the respective rates of 27.5% and 11.1%. This is so because after the passage of ten years since the 1980 Census, surely some of the persons who indicated limited English-speaking ability in 1980 will have improved their ability to speak English by the 1990 Census. However, the probable gain in English fluency due to maturation is almost certain to have been erased by the following factors:

- There has been a large influx of linguistic minorities into the state during the past decade, especially persons of Spanish-speaking origins.
- Adults who are not in the work force or who work in environments where they work with other linguistic minorities who speak the same language are less likely to improve their English proficiency skills dramatically.
- The requirement to perform all three linguistic skills—read, write and understand—may require a level of performance that exceeds the Census Bureau's category of speaking English "not well." Hence the census figures cited above probably **underestimate** the number of persons who are not capable of communicating in the English language at the level required for jury service.

The net result is that the disqualification rates of 28% for speakers of Spanish and 11% for speakers of other languages, however accurate in absolute terms, reveal the existence of a barrier with which native American speakers of English do not have to contend.

Factor #4: Peremptory Challenges for Language Spoken

There very well may be several impediments that arise at the stage of empaneling a jury when attorneys exercise their privilege of peremptory

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[39](...continued)
POPULATION, DETAILED POPULATION CHARACTERISTICS: NEW JERSEY, Tables 194, p. 32-7, and Table 197, p. 32-25 (December 1983).

[40]Ibid. The data are published in such a way that estimates for blacks and whites cannot be calculated.

challenge. It is clear that certain conduct by attorneys that excludes minorities is impermissible. At both the federal[41] and state[42] levels, for example, the respective Supreme Courts have held that the prosecutor is forbidden from challenging potential jurors "solely on account of their race or on the assumption that black [or any other cognizable group] jurors as a group will be unable impartially to consider the State's case against a black defendant."[43] The Task Force does not know the degree to which such peremptory challenges still may discriminate against minorities or discriminate in other ways that have not been found to be constitutionally impermissible.

However, there is one aspect of peremptory challenges in which case law has erected another impediment and, in our judgment, has done so without justification. In recent years, two cases have been reported wherein prosecutors have challenged prospective jurors on the grounds that their familiarity with the Spanish language would interfere with their ability to treat as evidence only the interpreter's interpretation of what witnesses who testify in Spanish. In State v. Pemberthy[44], the Appellate Division held that it was permissible for the State to excuse all Spanish-speaking jurors from the panel because speakers of Spanish do not constitute a cognizable group (two of the speakers of Spanish were non-Hispanic) and that, since the interpretation of the intercepted telephone conversations was a major issue at trial,

> considering the various Spanish dialects and the inherent problems in translating the conversations, there was the potential that Spanish-speaking jurors who possessed varying degrees of experience with the particular language or dialect used would rely on their own interpretations of given conversations.[45]

More recently, the United States Supreme Court has ruled on a similar case, Hernández v. New York. After challenging four Latino potential jurors and in response to objections from the defense, the prosecutor voluntarily expressed the reason why he had struck the jurors. The prosecution's case would involve key

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[41]Batson v. Kentucky, 106 S.Ct. 1712 (1986).

[42]State v. Gilmore, supra n. 1.

[43]Batson, supra n. 38, at 1719.

[44]224 N.J. Super. 280 (1988).

[45]Id. at 290.

witnesses who would testify in Spanish with the assistance of interpreters. The prosecutor was not certain that the bilingual jurors would listen and follow the interpreter instead of the Spanish-speaking witnesses. He apparently had talked to the prospective jurors previously and had concluded that while they said they would **try** to accept what the interpreter said as final arbiter of what the witnesses said, he concluded that they could not do so. The Supreme Court concluded that exclusion of jurors because they spoke the witnesses' language was race-neutral and not discriminatory on the basis of ethnicity since the prosecutor had a verifiable and legitimate explanation for excluding them.

There are three problems with the conclusions reached in Pemberthy and Hernández. First, they create another mechanism which eliminates minorities from jury service. "It provides legal grounds for denying a Spanish-speaking defendant a jury that contains any of his peers."[46] When this barrier is added to the existing English proficiency requirement, it virtually eliminates Latinos from jury service in those instances where a criminal trial involves Spanish-speaking witnesses since about 84% of Hispanics in New Jersey speak Spanish.[47]

Second, this practice can be viewed as penalizing persons who speak or learn a second language.[48] Being bilingual thus becomes a burden rather than an asset (unless, of course, the prospective bilingual juror does not want to serve). The Supreme Court's position is hardly a factor that encourages second language acquisition or affirms persons who already are bilingual. Rather, a new layer of prejudice is added against bilingualism.

Third, the concerns expressed by the prosecutors and condoned by appellate courts are misplaced. An underlying assumption that appears to be unrecognized

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[46]All of the following are taken from R. Prince, "An unspeakable ruling from the Supreme Court," THE DAILY JOURNAL A-5 (June 12, 1991).

[47]According to the 1980 Census, New Jersey's Hispanic population consisted of 491,867 persons. Dep't. of Labor and Industry, Div. of Planning and Research, Office of Demographic and Economic Analysis, NEW JERSEY 1980 CENSUS COUNTS OF POPULATION BY RACE AND SPANISH ORIGIN 4 (March 1981). The Census reported further that 414,234 persons spoke Spanish at home. U.S. Dep't. of Commerce, Bureau of the Census, 1980 CENSUS OF POPULATION, DETAILED POPULATION CHARACTERISTICS: NEW JERSEY, Table 197, 32-25 (December 1983). While the latter figure probably includes some persons other than Hispanics, the overwhelming majority are surely Hispanic. Hence it is safe to infer that approximately 84% of Hispanics (414,234 ÷ 491,867) speak Spanish at home.

[48]Prince, supra n. 45.

is that such arguments are really expressions of a lack of confidence in the performance of interpreters. **The notion that bilingual jurors would have different evidence depends on the assumption that interpreters fail to accurately interpret what witnesses say.** This is not a concern for which there is no support.[49] The real problem is quality of interpretation and the solution is to take steps to assure that interpreters are qualified.

Finally, the misplaced concerns of prosecutors, as validated by appellate courts, reveal that prosecutors and the appellate courts are not familiar with research that has shown that bilingual jurors **can** and **do** follow instructions to consider as evidence only the English interpretation, not the non-English testimony, of the witness. Susan Berk-Seligson, a sociolinguist on the faculty of the Department of Hispanic Languages and Literatures at the University of Pittsburgh, conducted a number of experiments with mock jurors in which she studied the effects that interpreters can have on the impressions jurors form of Spanish-speaking witnesses. She reached the following conclusions:

> This set of experimental studies has shown that ... even bilingual evaluators are affected by the English interpretations that they hear, which means that to a large extent they are able to minimize the effects of tuning in to the foreign language testimony. In effect, they are able to comply with the desire of the Court in so doing.[50]

Factor #5: Exemption for Care and Custody of Minor Children

The last legal impediment is an exemption rather than a qualification. The exemption is stated thus: "The following persons shall be exempt from service on any panel of grand or petit jurors: ... g. Any person who has the actual physical care and custody of a minor child...." N.J.S.A. 2A:69-2. This exemption has a discriminatory impact when there is a widely divergent proportion

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[49]In addition to the findings of our own Task Force (see pp. [page numbers to be inserted here]), numerous studies have shown how poor the quality of interpreting often is and how significant the effects of poor interpreting can be in trials. Two of the most helpful studies in pointing out the effects of poor interpreting on the quality of justice are the final report of the New Jersey Supreme Court Task Force on Interpreter and Translation Services, EQUAL ACCESS TO THE COURTS FOR LINGUISTIC MINORITIES (May 22, 1985), and S. Berk-Seligson, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS (1990).

[50]Berk-Seligson, id. at 196. See Chapter 8, "The Impact of the Interpreter on Mock Juror Evaluations of Witnesses," beginning at 146, for further details.

of minority parents who have the care and custody of minor children or if a disproportionate number of minority parents elect to exercise the exemption.

There are no data that directly demonstrate a disproportionate effect on minorities that can be attributed to the presence of minor children in the home. No data are collected by jury managers on the exemptions that are selected by prospective jurors, much less this particular exemption. Since we do not know whether minority parents who are eligible to exercise this option do so at rates higher than white parents who have minor children at home,[51] the only way to explore whether there may be a disproportionate effect on minorities is to determine whether minorities are more likely to have minor children at home.

This is the case for one subgroup of minorities.[52] Looking only at **single** mothers,[53] almost one in three African-American mothers is single with children and a little more than one in five Latino mothers is single with children. This contrasts starkly with the rates under one in ten for white single mothers (6%) and for Asian-Pacific Islander single mothers (3%). Table 4 provides the demographic details.

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[51]Given the disproportionate poverty rate among some minority groups and the lack of resources that may make poor parents more likely to seek exemption from jury service, it may very well be that minorities do make greater use of this exemption than do whites.

[52]This is the only subset of minorities for which data are readily available to explore the question of disproportionality in this context. Other subgroups of minorities (e.g., two-parent families with minor children) may or may not be similarly affected.

[53]Of course **any** mother with minor children could be affected by this exemption. However, we submit that the class of mothers with minor children who would be **most likely** to be affected by the exemption are single mothers.

TABLE 4

SINGLE FEMALE HOUSEHOLDERS WITH CHILDREN AND NO HUSBAND PRESENT

AS PERCENT OF FAMILY HOUSEHOLDS[54]

Racial/Ethnic Group	# of Mothers with Children Under 18	# of Family Households	% of Family Households with Single Mothers
White	91,494	1,657,678	6
Black	63,863	216,432	30
Asian-Pac.Isl.	884	25,755	3
Spanish Origin	24,840	120,978	21

Factor #6: Socioeconomic Status

We now move from impediments rooted in the legal system to focus on socioeconomic, political, and cultural ones. We begin by pointing out the impediments introduced by the socioeconomic status of minorities.

One unexpected finding is that at least some African-Americans and Latinos do not register to vote because they do not want to be called as jurors![55] While not registering to vote may reflect a desire to avoid jury duty, it appears to be rooted more in the recognition of the hardship jury service represents for a substantial proportion of minorities. Consider the following testimony of Marilee Jackson, a member of the Paterson City Council:

> In terms of jury issues and selection, one of the things that I find as an elected official is during the process of registering people to vote, I find that one of the reasons that people don't want to register to vote is they think that if they register to vote that they'll be automatically selected for jury duty. I was kind of amazed at that attitude, but I've been in office now for nine years and it's still the same as it was in 1980.[56]

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[54]1980 CENSUS, supra n. 29, Table 215, at 32-387 to 391.

[55]We don't know whether the same avoidance is true for other minority groups, nor do we have any data to indicate the incidence of such avoidance in any of the particular minority groups. This avoidance of registering to vote to avoid jury service has been found elsewhere as well. One author has concluded, "A penalty is thus exacted for voting." Van Dyke, supra n. 5, at 99.

[56]Paterson Public Hearing 689 (November 29, 1989).

This same experience was validated by two other witnesses: then Assemblyman (now Senator) and Union City Mayor Robert Menéndez[57] and Warren D. Blackshear, former coordinator of the Plainfield Voter Registration Coalition.[58]

The cost of jury service to any person, minority and non-minority alike, who is poor can be prohibitive. Persons who are underemployed face the risk of losing their jobs since there are no protections. For example, persons who are unemployed and in dire financial straits find it difficult to come up with the bus money just to get to the courthouse.[59]

The fact that the voter registration list is complemented by lists of persons with drivers' licenses from the Division of Motor Vehicles may offset to some degree the impact of some minorities' reluctance to register to vote on the representation of minorities in jury pools. However, we have no data or sense of the number of persons who have chosen not to register to vote but who have a driver's license and could still be called. The important point, however, is not **how many** minorities this may affect but the lengths to which some minorities go to avoid jury service.

Pay for jury service itself is viewed as offensive and hurts more than just prospective jurors.[60] Mr. Blackshear put it this way:

> For a minority or any other person whose wages are not reimbursed by their employer, and for a minority business-person, the current fees paid for juror service amount to a severe economic hardship. Since many jurors are reimbursed by their employers, it also places an unfair burden on minority and other small business persons who have to subsidize the jury system while they also lose the services of their employees.[61]

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[57]Union City Public Hearing 944 (November 30, 1989).

[58]Union County Public Hearing 1010 et seq. (December 2, 1989) and Written Testimony 41 et seq. (January 17, 1990).

[59]Richard Sims, Jersey City Public Hearing 347 (December 1, 1989).

[60]The compensation of both petit and grand jurors has been the same for some forty years: $5.00 per day and mileage reimbursement at the rate of 2¢ per mile, excluding the first mile both ways (i.e., to and from the courthouse). N.J.S.A. 22A:1-1.

[61]Written Testimony 43 (January 17, 1990).

Mr. Blackshear finally concluded, "It is my opinion that our current juror fee schedules inhibits [sic] jury service participation by minorities, disadvantaged persons, minority businesspersons and other small businesses."[62]

The Task Force does not know from empirical evidence that minorities are more likely to experience this fundamentally socioeconomic barrier insofar as jury service is concerned. However, it is clear that, with the general exception of Asians-Pacific Islanders, minorities are much poorer than whites. A summary of pertinent findings from the 1980 Census already reported elsewhere follows:[63]

- 26% of blacks and 27% of Hispanics were below the poverty level, compared to 6% of whites and 7% of Asians;
- 12% of blacks and 11% of Hispanics were unemployed, compared to 6% of whites and 4% of Asians;
- The median annual income was $9,774 for black males and $10,161 for Hispanic males, while the corresponding figures were $17,866 for white males and $19,979 for Asian males;
- The median annual income was $14,540 for black families and $14,597 for Hispanic families, while it was $24,184 for white families and $27,931 for Asian families.

Factor #7: Lack of Confidence in the System

There is for some minorities the additional inhibiting factor of lack of confidence in the Judiciary. That lack of confidence ranges from a general sense that the Judiciary is not especially sensitive to minority needs to an outright fear of the Judiciary.[64]

For example, we received testimony from one African-American male who said he would not serve on a jury even if he had the chance. David Reeves attributed that position to two factors: he did not want to be part of any mechanism that had the responsibility of determining guilt and he had had numerous experiences with the court system in a particular county. Reeves said,

> Maybe my attitude might change down the road, but I, I think the way attitudes change—I learned in sociology that

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[62]Letter to the Task Force, WRITTEN TESTIMONY 43 (January 17, 1990).

[63]See Tables 17-20 and the pertinent discussion on pp. xx-yy, supra, in Chapter Three.

[64]In fact, the Coleman Committee referred to what it called "an inherent fear of the judicial system which keeps many minorities from willingly responding to a call to jury service." COLEMAN REPORT, supra n. 13, at 32.

> attitudes change with successes. Your attitudes improve when you start experiencing some successes. If you constantly experience losses, then you more, more than likely tend to foster negative outlook on things, it's natural. So I think my hesitation to serve on a jury is just being out of a little bit of bitterness that I had and the way that I was treated.... My confidence in the way things are handled, especially with black males, was really shattered. And that's why I would probably decline to serve....[65]

The Task Force is especially concerned about the tenor of this testimony insofar as it suggests that some minorities are so disaffected and disheartened by the court system that they do not desire to exercise the rights and privileges for which their forebears paid such an exorbitant toll. Minorities who do not want to vote or serve as jurors due to this disaffection pose a special challenge to minority and non-minority leaders, both in the community and in the Judiciary.

Another way to express the lack of confidence is to state that it is difficult to have confidence in a system where the majority controls or appears to control everything, or where one is an outsider. If a minority person's case goes before an all-white grand jury, or a white judge and a white jury; and if that practice is perceived to occur time and time again, it is not difficult to see how minorities can conclude that the system is stacked against them. The belief is that there are two systems of justice: one for whites, and another, which has a different set of standards, for minorities.[66] The sue perhaps was most eloquently addressed by Dennis Vincent Nieves, an Assistant Deputy Public Defender, who testified as follows at a public hearing:

> It has been a rarity when I am able to do a jury trial and have more than one or two members of the minority community. This is crucial in showing those who are stuck in this system that they will be judged by a fair cross section of the community. If they're sitting next to me and see no one with the same skin tone, invariably they're going to have nothing but distrust for it.[67]

The component fueling the belief that minorities have little to no influence in the judicial system is that being an outsider or feeling like one is outside the system generates lack of confidence. One witness described at length how

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[65]David Jonathan Reeves, Newark Public Hearing 630-631 (November 30, 1989).

[66]Reverend Moses Williams, Perth Amboy Public Hearing 765-766 (December 7, 1989).

[67]Perth Amboy Public Hearing 806-807 (December 7, 1989).

intimidating and alienating it was to go before a grand jury to testify about a crime of which he was apparently a victim. He referred to the experience in two ways. First, he spoke of it as going into a small room "When there is nobody that looks like you but there's twelve guys in the room, with guns.[68] Secondly, he described the experience as going into a room "where everybody knows everybody but me. ... It was like a boys club. Just a little club."[69] It seemed to him that the key persons involved with the grand jury were very tight with each other: the prosecutor's staff, the police officers (including their superiors), and the grand jurors.

The ultimate blow to his faith in the grand jury system, though, was the fact that the grand jury ultimately failed to return an indictment in the case. The victim went on to urge the Task Force to take a serious and close look at the grand jury system.[70]

A sister and concerned friend of an inmate wrote a letter in which they listed several incidents they felt were "the results of racist attitudes." They wrote the letter hoping someone in the Judiciary would look into the incidents "because the injustices that we have witnessed before, during, and after the trial has assured us that there is very little or no justice for minorities in the court system."[71] The second and third incidents they reported how they felt the jury system had contributed to that erosion of confidence:

> 2. The pool of potential jurors were predominantly black, yet the majority of jurors chosen were white and predominantly female. There were only three males on the jury, two of whom were black.
>
> 3. Of the fourteen jurors who heard the case, ironically the two black males were chosen as the alternate jurors, and thus eliminated from final jury deliberations. Isn't it strange that the court officer could reach into the drum and pull out the names of the two black male jurors to be excluded from

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[68]David Allen Brown, President of the Long Branch Chapter of the NAACP, Neptune Public Hearing 474 (February 27, 1990).

[69]Id. at 473.

[70]Id. at 484.

[71]Letter to Robert D. Lipscher from "Sister" and "Concerned Friend" in CONFIDENTIAL WRITTEN TESTIMONY 103-105 (August 15, 1989).

final deliberations. We feel that the probability of that happening is slim to none.[72]

Factor #8: Cultural Dynamics

There are also cultural factors that impede some minorities from wanting to serve as jurors. Mayor and then Assemblyman Robert Menéndez said, for example, that Hasidic Jews did not want their wives registered to vote since they did not want them serving jury duty.[73] He also pointed to the special concern of some Hispanics with respect to being embarrassed about their language ability. Menéndez stated,

> You know, those who have the timidity about, of their language ability, will they understand what is going on in the trial? Will they comprehend the judge? Will they be embarrassed before, you know, the peers on the jury as well as the bench? You know, those are legitimate concerns for which maybe you do not want to be on the jury beyond the mundane things of your job and your family and what not.[74]

The Committee on Minority Concerns noted an additional obstacle: many Latinos come from totalitarian countries, a heritage which has produced a profound fear of all things governmental which results in a fear of jury service in this country.[75] The Task Force believes that there are likely to be numerous other cultural factors that impede jury service, which further research would ferret out.

Conclusion

The Task Force concludes that there are numerous factors that impede access to jury service by minorities. Each of those factors individually produces some degree of underrepresentation. Furthermore, when they are taken collectively and their combined effect is contemplated, **as much as one-half of Blacks, Hispanics, and Asians-Pacific Islanders should be considered unavailable for jury service due to the combination of legal, socioeconomic, and cultural factors.** A summary

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[72] Id. at 104.

[73] Union City Public Hearing 944 (November 30, 1989).

[74] Ibid. at 945.

[75] COLEMAN REPORT, supra n. 13, at 22.

of the respective factors discussed above which can be quantified and support this conclusion is provided in Table 5.

The assumptions that undergird the present methods of qualifying and empaneling juries, then, are not viable for at least one-half of all minorities, given legal, social, economic, and cultural barriers as long as the goal of a jury of one's peers is pursued vigorously. Given this formidable array of obstacles to jury service, the Task Force submits that minorities **must necessarily** be underrepresented even though we have no data that shows that they actually are underrepresented.

TABLE 5

ESTIMATED PERCENTAGES OF RACIAL/ETHNIC GROUPS ELIMINATED FROM JURY SERVICE BY VARIOUS FACTORS[76]

Factor Inhibiting Jury Service	Percentage of Whites Affected	Percentage of Blacks Affected	Percentage of Hispanics Affected	Percentage of Asians-Pac. Isl. Affected
Citizenship	3%	3%	23%	50%
Conviction-free[77] Males Females	6% 1%	23% 3%	10% 2%	Negligible Negligible
English Language	Unknown	Unknown	28%.	11%
Care/custody of Children (Single Mothers)	6%	30%	21%	3%
Below Poverty Level	6%	26%	27%	7%

[76]The reader is alerted to the fact that the percentages in this table are not amenable to being added. There is surely significant overlapping across the categories, but the degree of such overlapping cannot be estimated and the reader is merely advised to avoid the temptation to total the columns since the resulting figure would be invalid.

[77]The figures in this row are taken from Mauer, supra n. 32 and apply only to males in the age group of 20-29 who are under control of the criminal justice system on any given day. While it may not be appropriate to apply these percentages to all adults within each racial/ethnic category, they illustrate the disproportionate effect that the requirement to be free of convictions has on two of the three minority groups.

FINDING #5

WHILE SIGNIFICANT STRIDES TOWARD REDUCING THE PROBABILITY OF DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES HAVE BEEN MADE, THE DEGREE TO WHICH THOSE STRIDES AT CONTROLLING ABUSES IN THE AREA OF PEREMPTORY CHALLENGES HAVE SUCCEEDED ARE UNKNOWN.

A widely respected expert on juries has concluded that the practice of peremptory challenges "is being abused—the prosecution frequently uses its peremptories to eliminate entire ethnic groups—and it is time to consider some remedial measures."[78] While that statement focused on the national scene, the Coleman Committee reached the same conclusion with respect to New Jersey specifically seven years later. "The Committee noted that peremptory challenges often are utilized to exclude minorities and felt that another obstacle, in addition to those already existing, is clearly excessive."[79]

While the Task Force neither obtained data on the rates at which peremptory challenges are used or the rates at which minorities are subject to such challenges when compared to non-minorities, the practice is at the very least an open door through which minorities can summarily be excluded without explanation. The Task Force notes that the New Jersey Supreme Court is very much aware of this issue and has gone a long way to reducing the possibility that peremptory challenges will be widely abused by prosecutors. In mid-1986, the Supreme Court decided State v. Gilmore,[80] an Essex County case in which the defendant was an African-American and the prosecutor had challenged all nine black jurors (two for cause and seven peremptorily). The court held,

> Article I, paragraphs 5, 9, and 10 of the New Jersey Constitution forbid a prosecutor to exercise peremptory challenges to remove potential petit jurors who are members of a cognizable group on the basis of their presumed group bias; the State, however, may peremptorily challenge such venirepersons on grounds of situation-specific bias. Moreover, we determine that the defendant here has established that the prosecutor impermissibly excluded all black potential petit jurors.[81]

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[78]Van Dyke, supra n. 5, at 166 (emphasis in original).

[79]COLEMAN REPORT, supra n. 13, at 32.

[80]103 N.J. 508 (1986).

[81]Id. at 517.

The Supreme Court established procedures that trial courts must follow when the defense submits that the State improperly makes use of peremptory challenges. Those procedures include the following major features:[82]

- Objection by the defense must be timely, "during or at the end of the jury selection, but before the petit jury is sworn."
- The trial court must presume the State exercised its peremptory challenges in a permissible manner, but the presumption is rebuttable.
- Defense must show "that the potential jurors wholly or disproportionally excluded were members of a cognizable group within the meaning of the representative cross-section rule" and "that there is a substantial likelihood that the peremptory challenges resulting in the exclusion were based on assumptions about group bias rather than any indication of situation-specific bias."
- If the trial court finds that a prima facie case of purposeful discrimination has been established, "a presumption of unconstitutional action" follows which the prosecution may then attempt to rebut.
- The trial court determines whether the prosecution succeeds or fails in rebutting the presumption of unconstitutional action, resulting in either a victory for the defense in which case the jurors—both those empaneled thus far and those remaining unselected jurors on the panel—are dismissed and the jury selection process starts over, or a victory for the State in which case the trial proceeds.

Minorities are subject to peremptory challenges which are thought to be racially or ethnically motivated some of the time. For example, the judges and court managers who participated in the opinions study clearly saw race as a factor considered by attorneys in the exercise of peremptory challenges. The vast majority (89%) of these respondents reported the opinion that sometimes, usually or always attorneys consider race during peremptory challenges. Full details are provided in Table 6.

TABLE 6

Percentage Distribution of Responses to
the Court Process Questionnaire, Q54:
"Attorneys consider race when exercising peremptory challenges."

Respondent Group	Never	Rarely	Sometimes	Usually	Always
Judges only	2%	4%	56%	32%	7%
Managers only	3%	16%	58%	20%	3%
Judges & Managers	2%	9%	57%	27%	5%

[82]See §V of the opinion, at 533-539.

Unfortunately, these data are difficult to interpret. On the one hand, the statement regarding which the judges and managers were asked to express their opinion does not ask whether such consideration of race is impermissible under Gilmore or is thought to be otherwise impermissibly discriminatory. As stated, the statement in the questionnaire is completely neutral. Furthermore, it refers to attorneys generally, not to prosecutors, the class of attorneys traditionally viewed as engaging in making discriminatory use of the peremptory challenge in an unconstitutional manner.

On the other hand, the statement could be viewed as **assuming** a certain element of impermissible bias on the part of both prosecution and defense in a criminal proceeding or even on the part of both sides in a civil trial. Even if those assumptions are not made, the respondents' answers can be viewed as showing that considerations of race are of the impermissible sort since they involve grouping human beings according to group bias rather than situation-specific bias in the context of a case. The fact that the questionnaire was completed a little over one year **after** Gilmore was handed down makes the respondents' answers even more interesting: it could suggest that Gilmore did not solve the problem. See Table 6 for additional detail.

RECOMMENDATION #1

THE CHIEF JUSTICE SHOULD RECONSTITUTE THE JURY UTILIZATION AND MANAGEMENT TASK FORCE AND DIRECT IT TO RECONSIDER ITS FINDINGS AND RECOMMENDATIONS IN THE LIGHT OF THE FINDINGS REPORTED ABOVE, ADDITIONAL RESEARCH TO BE CONDUCTED, AND THE RECOMMENDATIONS DESCRIBED BELOW.

A decade ago Chief Justice Wilentz appointed the Jury Utilization and Management Task Force. It submitted its final report in December, 1982. To date recommendations requiring statutory change have not been implemented, but the Supreme Court has implemented nearly all recommendations which could be accomplished administratively. Since action on some recommendations is still pending and the findings reported herein go far beyond those of that earlier body, the Chief Justice should reconvene that Task Force, reconstitute it

partially by including representation from the Task Force on Minority Concerns, and charge it do the following:

First, the Task Force should review and evaluate the pertinent material in this report. This might include contacting witnesses who testified before the Task Force on Minority Concerns.

Secondly, the Task Force should conduct additional research. We have not studied in any depth the factors that do impede jury service. Research, perhaps of an ethnographic and exploratory nature, needs to be conducted to explore in greater detail and with greater precision the factors that inhibit voter registration; the desire to serve on juries; and the degree to which those factors affect minorities differently than whites. Furthermore, the three research questions outlined in the discussion of Finding #3 should be explored, **with a special emphasis on the possible discriminatory effects of peremptory challenges.**[83] However, we urge the Chief Justice to give the reappointed Task Force a strict time frame and sufficient staff support so that only the minimum amount of time necessary—certainly no more than one year—be expended before a final set of recommendations be presented to the Supreme Court.

Thirdly, the Jury Task Force should perform a two-tiered feasibility analysis of each possible recommendation it would endorse: (1) assess the probable impact on minorities enfranchisement as jurors and (2) recommend that those with the greatest possibility of expedited implementation and greatest good be identified for priority attention and action.

Finally, the Jury Task Force, given the exigency of the issue, should be directed to be bold and courageous in developing its recommendations. In doing so, it should be directed to consider the following tentative recommendations as possible solutions to the impediments to jury service faced by minorities and many non-minorities alike.

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[83]The call for the abolition of peremptory challenges in certain instances should be carefully considered. "Peremptory challenges should be abolished in race-sensitive cases to permit meaningful representation by black trial jurors." Colbert, supra n. 10, at 5, 128.

1. The qualification of citizenship should be relaxed.[84] Jurors, if they are to perform their duties, need to have some basic understanding of the traditions, culture, and institutions of the society in which a jury's work is embedded. They must have an experience base within the culture from which to weigh evidence and reach decisions. Some believe that to permit non-citizens to serve on juries would "substantially diminish the significance of citizenship."[85] The Jury Standards Task Force of the American Bar Association supports exclusion of aliens.

However, non-citizens have the same right to trial by a jury as do citizens, and that right includes their being judged by a jury of their peers (i.e., a pool of jurors and a process of selecting jurors that do not automatically eliminate all non-citizens). Non-citizen jurors cannot only provide peer presence on juries for non-citizen litigants, but they also can enrich the viewpoints from which evidence is assessed.

Van Dyke offers two other perspectives in favor of relaxing this qualification. First, he says that it is odd that aliens can become attorneys and hold government jobs, but are still excluded from jury service. He cannot understand what compelling interest justifies inclusion of aliens as attorneys and public employees and excludes them from jury service. Second, he reports that there have been times in the country's history when aliens were allowed to serve on juries and did so. He knows of no problems that resulted from their service.[86]

A compromise position would be that once a non-citizen has reached a certain level of socialization in our culture, that person should not be ineligible on the sole ground of non-citizenship. We suggest that the requirement be relaxed as follows: require a residency period in the United States for non-citizens of five years. This could be complemented by additional factors, some of which could be requirements, e.g., evidence of intention to reside permanently in this

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[84]This was recommended by Ignacio Saavedra, Jr., Esq. Union City Public Hearing 980 (November 30, 1989).

[85]American Bar Association, STANDARDS RELATING TO JUROR USE AND MANAGEMENT 48 (n.d.) (hereinafter ABA JURY STANDARDS).

[86]Van Dyke, supra n. 5, 15 132-133.

country and ultimately seek citizenship, certain level of education, demonstrated cultural competence in the adopted culture, etc.

2. The qualification of having no conviction should be relaxed or omitted altogether. Once a person has fulfilled his or her obligations through some form of penal sanction and is discharged from incarceration, parole, or probation, that person should be viewed as being restored to being eligible for jury service.[87] There may be exceptions to this general rule, but, in our judgment, the rule would be restoration of juror eligibility. One variation might be, depending on the nature or severity of the offense that lead to the conviction, a minimum period of time that must pass post-release before becoming eligible to serve. A review of pertinent law in other jurisdictions[88] might provide both support for this change and model standards to consider. The Jury Standards Task Force of the American Bar Association has recommended that persons who have convictions should be disqualified only if they "have been convicted of a felony and have not had their civil rights restored."[89]

3. The qualification of having to read, write, and understand English should be relaxed. Everyone has a stake in the ability of jurors to exercise certain language and analytic skills. Testimony and instructions from judges must be understood. Furthermore, it is certainly easiest and most cost effective when jurors read, write, and understand English.[90]

The Jury Utilization and Management Task Force already has recommended that the requirement of **writing English** be eliminated.[91] However, even if adopted by the Legislature, that recommendation does not go far enough.

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[87]"[T]he justice of continuing to punish former convicts after they have served their sentences is highly questionable." Van Dyke, id. at 133.

[88]A 1977 study found that about 31 of 52 jurisdictions studied (states, subsets of states and the District of Columbia) proscribed jury service for persons with felony convictions. Van Dyke, id. at 272-280.

[89]ABA JURY STANDARDS, supra n. 80, at 47.

[90]The ABA's Jury Standards Task Force recommends prohibiting persons from serving if they "are not able to communicate in the English language...." Id. at 47-54.

[91]REPORT OF THE JURY UTILIZATION AND MANAGEMENT TASK FORCE 25 (December 14, 1982) (hereinafter JURY UTILIZATION REPORT).

Some view the English proficiency requirement to be a form of discrimination. The solution is quite simple: provide an interpreter. This view was expressed by Ignacio Saavedra, Jr., Esq.:

> So there are some Italians or Nicaraguans, they should sit [as jurors], and you just provide an interpreter. ... That is done to defendants in trials. So why not, why not the juror? ... Those that reside int he community, I think they're entitled to participate in the judicial process, not to be discriminated [against] because they don't understand the language."[92]

The availability of qualified interpreters makes jury service possible for linguistic minorities in ways that were not possible before. Recent experiences with deaf jurors, for whom sign language interpreters were assigned both during courtroom events and jury room deliberations, have shown that jurors who participate through interpreters can function as well as anyone else.[93] If this can be done for deaf persons, surely it can be done for persons whose mother tongue is not English but who speak insufficient English to function as effective jurors without the assistance of an interpreter. At the very least, this possibility should be explored though a pilot project.

4. The effects of socioeconomic status should be given great weight and creative compensation programs authorized and funded. First, for any prospective juror who would not be paid while serving on a jury, that person should be entitled to the minimum wage, compensation equal to what is lost, or some other amount far beyond the recommended $10.00 per diem.[94] Second, unemployed prospective jurors who are indigent should be compensated at at least the minimum wage. Third, single parents should receive some form of compensation for day care expense. An alternative to this option would be the provision of free child care services at or near court houses for parents (be they jurors, witnesses,

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[92]Union City Public Hearing 980 (November 30, 1989).

[93]A memorandum from the Administrative Director of the Courts to the Assignment Judges reported two positive experiences with deaf jurors. Robert D. Lipscher Memorandum to Assignment Judges (October 1, 1984). Others have been reported since. Michael F. Garrahan Memorandum to Robert D. Lipscher re Service by Deaf Jurors (February 14, 1986) and Michael F. Garrahan Memorandum to Robert D. Lipscher re Deaf Juror; Morris County (May 4, 1988). A Federal judge reviewing the rejection of a deaf juror in Blair County, Pennsylvania, overruled the judge. "Deaf People as Court Jurors," New York TIMES 36 (January 22, 1989).

[94]The Jury Utilization and Management Task Force recommended that compensation be increased from $5.00/day and $.02/mile to a flat rate of $10.00/day. JURY UTILIZATION REPORT, id. at 44.

defendants or anyone else having business with the courts). Fourth, if there is going to be an economic hardship on any business (and especially a **small** business) because of an employee's jury service, some means of minimizing or eliminating that hardship should be devised. Finally, Recommendation 11 of the Jury Utilization and Management Task Force, "Legislation should be initiated that will protect a juror from being terminated, laid off, or otherwise penalized on account of jury service,"[95] should be strengthened and implemented. Many other aspects of compensation may be equally worthy of consideration.[96]

5. To minimize abuse, the number of peremptory challenges permitted all sides in both civil and criminal trials should be reduced. The ABA's Jury Standards Task Force concluded that the most "practical means of safeguarding the representativeness guarantee without unduly curtailing the legitimate role of the peremptory challenge or encroaching upon its peremptory nature" was to limit the number of peremptory challenges permitted **both** sides.[97] The Task Force agrees and recommends a reduction in the number of challenges permitted by N.J.S.A. 2A:78-7 along the lines recommended by the ABA's Jury Standards Task Force.[98] Furthermore, the suggestion that peremptory challenges should be **prohibited altogether** in race-sensitive cases should be examined carefully.[99]

6. The possibility that all-white juries should be presumed to be inherently discriminatory when defendants in criminal cases or any party in a civil matter is a minority should be studied carefully. If it is true, as one legal scholar has alleged,[100] that all-white juries cannot avoid making discriminatory decisions, or if minorities cannot avoid concluding that decisions in such situations must have been discriminatory and thereby suffer a loss of

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[95]Id. at 44.

[96]Other suggestions are made by the ABA's Jury Standards Task Force. See ABA JURY STANDARDS, supra n. 80, at 131-136.

[97]Id. at 84.

[98]Id. at 83-94. This approach is also supported by Lee Goldman, Visiting Associate Professor of Law at George Washington University National Law Center. "Toward a Colorblind Jury Selection Process: Applying the 'Batson Function' to Peremptory Challenges in Civil Trials," 31 SANTA CLARA L. REV. 147, 206 (1990).

[99]Colbert, supra, n. 10 and O'Connell, supra n. 9.

[100]Colbert, supra n. 10.

confidence in the system, then it may be necessary to establish a policy that requires a minimum number of minority jurors (Colbert suggests a minimum of three in criminal trials).[101] This would be a radical departure from existing case law and presents numerous practical problems,[102] but it may be the step that should be taken if minority confidence in the jury system specifically and the court system generally is to be assured—and the practical problems would have to be identified and overcome because the gain would be much greater than the loss.

7. A program of public education aimed at familiarizing minorities with the significance of and facts about jury duty should be designed. A comprehensive program of educating and empowering minorities and non-minorities alike with respect to jury duty should be developed. It would certainly include, for example, outreach packages for the school systems, a major public relations outreach through the media and perhaps even direct mail, and reliance on minority community-based organizations and religious groups. Existing practices of selecting jurors would be evaluated for racial and ethnic sensitivity and, as needed, modifications would be made.

RECOMMENDATION #2

THE SUPREME COURT SHOULD CONSIDER AUTHORIZING THE ADMINISTRATIVE OFFICE OF THE COURTS TO SUPPORT LEGISLATION PROHIBITING THE EXCLUSION OF JURORS WHO ARE BILINGUAL.

Three days after the United States Supreme Court released its decision in Hernández v. New York, Assemblymen Joseph Charles and John Watson introduced A-4959. The bill states simply:

> 1. No peremptory challenge shall be used by the prosecution in any criminal case to exclude a prospective juror on grounds arising out of that person's ability to understand or speak a language in addition to English.

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[101] Id. at 124.

[102] Some of the challenging questions are these: How would this be applied to different minority groups? Would an Hispanic defendant require three **minority** jurors or three **Hispanic** jurors, and if the answer is three **Hispanic** jurors, should they share the same national origin (e.g., Puerto Rican jurors for Puerto Rican defendants)? How would such information be obtained, at what stage of the process, and how would minority jurors actually be selected to reach the minimum number? Would mandatory inclusions occur before or after the selection of alternates?

2. This act shall take effect immediately.

The Task Force recommends that the Judiciary actively support the passage of this bill.